1995

State of Utah v. David E. Valdez : Brief of Appellee

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. DAVID E. VALDEZ, Defendant/Appellant.	*Priority No. 2* **Case No. 950794-CA**

DEFENDANT APPEALS FROM HIS CONVICTIONS FOR CAUSING A RIOT, A THIRD-DEGREE FELONY, AND DISCHARGING A FIREARM FROM A VEHICLE, A THIRD-DEGREE FELONY, IN THE SECOND JUDICIAL DISTRICT COURT FOR WEBER COUNTY, THE HONORABLE MICHAEL D. LYON, PRESIDING

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BASIS OF APPEAL AND JURISDICTION

Defendant appeals from two third-degree felony convictions: discharging a firearm from a vehicle and causing a riot (R. 144-45). On appeal, defendant claims trial counsel was ineffective for failing to move to suppress evidence and failing to bring to the jury's attention evidence that one of the State's witnesses received a "benefit" for his testimony. Brief of Defendant at 14. This Court has jurisdiction over appeals from third-degree felony convictions under Utah Code Ann. § 78-2a-3(e) (Supp. 1995).

ISSUES ON APPEAL AND STANDARDS OF REVIEW

1. When trial counsel refused to file a motion to suppress, did he provide substandard performance that prejudiced defendant? To successfully challenge trial counsel's ineffectiveness, defendant must establish both that his

performance "fell below an objective standard of reasonableness" and, consequently, prejudiced the outcome of the trial. *State v. Perry*, 899 P.2d 1232, 1239 (Utah App. 1995) (quoting *Strickland v. Washington*, 466 U.S. 668, 685 (1984)).

2. Given defendant's failure to provide Jeremiah Graham's plea agreement and criminal record to the appellate court, is his claim that the trial would have ended in a more favorable result had those items been introduced, pure speculation? In *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993), the Utah Supreme Court ruled that "proof of ineffective assistance" must be a "demonstrable reality" not a speculative matter."

RELEVANT PROVISIONS

Any necessary provisions are included in the text.

STATEMENT OF THE CASE

Procedural History

The State charged defendant with committing three crimes: (1) attempted murder, a second-degree felony in violation of Utah Code Ann. § 76-5-203 (1995); (2) discharging a firearm from a vehicle, third-degree felony in violation of Utah Code Ann. § 76-10-508 (1995); and (3) causing a riot, a third-degree felony, in violation of Utah Code Ann. § 76-9-101 (1995) (R. 6-8).

After a three-day trial, the jury acquitted defendant of the attempted murder charge but convicted him of the third-degree felony charges (R. 83-86). Subsequently, the trial court sentenced defendant to two concurrent indeterminate prison terms of zero-to-five years and a consecutive indeterminate term of zero to five years as a firearm enhancement (R. 147).

Statement of Facts

THE DRIVE-BY SHOOTING

At 9:45 in the evening on September 30, 1994, a purple Ford Ranger crept slowly up B Avenue in Ogden (R. 234). The three men in the cab and five in the truckbed, including defendant, wore sunglasses and "rags"[1] around their heads to identify themselves as "Crips"[2] and to disguise their personal identities (id.). They were looking for the house where the "Bloods" were partying and they planned to raid it and fight their rivals (R. 234; 339). When they found the party, they told Emmett Johnson, the driver, to turn around at the top of the road,

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[1] "Rags" are bandanas (R. 237).

[2] The term "Crips" refers to one of the two primary gang affiliations involved in this crime; the other being "Bloods" (R. 237). Defendant and the other individuals named in this Statement are Crips. The individuals in the truck were members of two "Crip" sub-gangs: O.V.G. ("One Violent Gangster") and Eight-Ball Crips (id.) Defendant belongs to the O.V.G. gang (R. 633). The victims were members of a "Bloods" gang called the West Side Players or West Side Pirus (R. 237).

drive down in front of the home and stop (R. 337). Orlando Naranjo, sitting in the truckbed, saw defendant pull his gun out of his coat and cock it (R. 337-38). One of the Crips in the back of the truck started yelling at the Bloods and throwing up their "signs," hand gestures that identify gang affiliation (id.). The bloods started running toward the truck, throwing rocks and beer cans when defendant, one of the Crips in the truck, pulled his gun and started shooting (R. 235; 526). Emmett Johnson looked in his rear view mirror when he heard the shots and saw gun flashes coming from the defendant's location in the truckbed (R. 297). Of the eight fired bullets, all of which were 9 millimeter, three went through a baby's bedroom window in the apartment complex where the party occurred (R. 252). One passed through the leg of a baby chair (R. 252). Another hit Pedro Balli, a member of the "Bloods" gang, in the left thigh (R. 280).

Sitting in the back of the truck near defendant, Jeremiah Graham saw him put the gun back in his jacket after firing (R. 235). Afterward, Johnson "slammed on the gas" and another gang member told him to drive to the defendant's aunt's house in Roy (R. 298). During the drive, Jessie Diarte, another gang member in the truckbed, heard defendant say "I hope I got one" and saw him put the gun into his waistband (R. 463). When they arrived at the

house, defendant told Johnson to remove his neon purple license plate holder because "the police could identify the truck by that" (R. 301-02). He took the license plate holder into the house and left his gun under 16-year old Tiffany Almeida's bed (R. 365). After ten minutes, Johnson drove defendant back to the Fred Meyer in Ogden where he had earlier parked his car (R. 302). Diarte saw the license plate holder in the trunk of defendant's car (R. 466).

THE SEARCH OF DEFENDANT'S CAR

Approximately two hours later, defendant was sitting in a Taco Maker restaurant in Ogden when West Side Pirus gang members drove into the parking lot (R. 612). Three of these "Bloods" came in and started gesturing at defendant and his friends, yelling "you shot my home boy" and telling them to come outside (R. 614). Defendant and one of his friends ran to the back of the kitchen and asked an employee to call the police (R. 526, 614). For the next 15 minutes, the Bloods waited out in a car and defendant and his friends stayed in the restaurant (R. 615).

Two of the officers who responded, Officer Tony Huemiller and Officer Richard Stewart, both knew of the drive-by shooting earlier that evening and possible O.V.G./West Side Pirus involvement (R. 425, 430). Officer Stewart was called out as a result of that shooting (R. 416). They also knew that the

vehicle they were looking for had a neon license plate cover (R. 417, 431). When the officers arrived, they asked defendant to come outside where he gave them the keys to his car and allowed them to search (R. 617). Officer Stewart searched in the trunk and saw the neon license plate cover (R. 417). Officer Huemiller, searching the interior of the car, found the unspent bullet on the floor of the passenger side (R. 418-19, 428). Subsequent tests showed that the bullet had been chambered in the same weapon as the spent bullet casings found at the drive-by scene (R. 442).

SUMMARY OF THE ARGUMENT

Defendant's claim of ineffective trial representation should be rejected because trial counsel properly refused to file a motion to suppress the bullet. Defendant's challenge to trial counsel's not impeaching Jeremiah Graham also fails because he does not provide evidence about the plea agreement or Graham's alleged criminal record. Therefore, defendant's assertion that the trial would have ended differently had this material been presented is speculation.

The bullet was lawfully found under the plain view doctrine. Defendant does not contest that he consented to the search and that the bullet was in plain view. He challenges only the "clearly incriminating" nature of the bullet. When determining whether evidence is "clearly incriminating," courts look at the

circumstances and knowledge available to the officer. The officer knew of the two-hour old gang-related drive-by shooting, that defendant had in his trunk an incriminating piece of evidence, i.e., the license plate cover, wanted as part of that investigation.

Though contesting trial counsel's not introducing into evidence the plea agreement or Graham's criminal record, defendant does not provide the court with copies of either item. To this day, no one knows what agreement, if any, accompanied Graham's plea bargain. Similarly, defendant does not inform of the status of Graham's criminal record, if any. Given this paucity of information, defendant's claim that the trial would have ended more favorably had the jury known of the plea agreement contents and the criminal history is pure speculation.

ARGUMENT

I. BECAUSE THE BULLET WAS LEGITIMATELY SEIZED UNDER THE PLAIN VIEW DOCTRINE, A MOTION TO SUPPRESS WOULD HAVE BEEN MERITLESS; THEREFORE, COUNSEL'S REFUSAL TO FILE SUCH A MOTION WAS NOT INEFFECTIVE.

Trial counsel's responsibility to provide effective representation was not compromised by his refusal to file a motion to suppress the bullet found in defendant's car. When he saw the bullet, Officer Huemiller knew about the

drive-by shooting two hours before, the potential involvement of O.V.G. in that shooting, and that defendant's trunk contained the license plate cover, described in the attempt-to-locate regarding the shooting. These circumstances provided sufficient evidence under the "plain view" doctrine to justify the seizure.

In *State v. Keitz*, 856 P.2d 685, 691 (Utah App. 1993), this Court set out the three-fold test to determine the legality of a seizure under the plain view doctrine: (1) lawful presence of the officer; (2) evidence in plain view; and (3) evidence "clearly incriminating." Here, neither the first nor second tests are in dispute. Defendant verbally consented to the search (R. 617). He then gave the keys to Officer Huemiller and even opened the door for him to search the car (id.). Located on the floor of the front passenger side, the bullet also was unquestionably in plain view (R. 418-19; 428). Defendant implicitly concedes these facts and, consequently, the first two folds of the three-test. The only dispute is the "clearly incriminating" nature of the bullet.

In *Texas v. Brown*, 460 U.S. 730, 739 (1983), the federal supreme court stated that their decisions "have come to reflect the rule that if, while lawfully engaged in an activity in a particular place, police officers perceive a suspicious object, they may seize it immediately." Under *Brown*, an officer may seize an item if he has probable cause to believe it is associated with criminal activity. *Id.*

at 741-42. The court noted that the probable cause standard is a flexible and common-sense one, requiring only that "the facts available to the officer would 'warrant a man of reasonable caution in the belief'" that the evidence is associated with criminal activity. *Id.* (quoting *Carroll v. United States*, 267 U.S. 132, 162 (1925). Utah's courts have consistently applied the *Brown* formula, although the phrase "clearly incriminating" somewhat overstates the level of suspicion needed.[3]

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[3] This term calls to mind language the United States Supreme Court used in the plurality opinion in *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). There, the plurality stated that it must be "immediately apparent" to the police that the items seized evidence a crime. *Id.* The majority in *Brown* specifically rejected this term, calling it an "unhappy choice of words since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine.'" *Brown*, 460 U.S. at 741. The phrase originated in *Washington v. Chrisman*, 455 U.S. 1, 6 (1982) where the high court stated that the plain view "exception ... permits a law enforcement officer to seize what **clearly** is **incriminating** evidence...."

This language should not be seen as a minimum requirement because the evidence seized in that case was marijuana, evidence clearly incriminating per se. Unfortunately, the use of the term as shorthand also implies the same "high degree of certainty" as "immediately apparent" in *Coolidge*. According to *Brown*, a "'practical, nontechnical' probability that incriminating evidence is involved is all that is required." *Id.* at 742. In any event, in Utah jurisprudence, the phrase "clearly incriminating" is an empty vessel. The courts have always defined the phrase in probable cause terminology, as *Brown* demands. *State v. Gallegos*, 712 P.2d 207, 210 (Utah 1985) ("[T]he clearly incriminating requirement also mandates that officers have probable cause to associate the

Looked at from the viewpoint of Officer Huemiller,[4] his opinion that the bullet evidenced criminal activity was reasonable: (1) a drive-by shooting had occurred two hours before that may have involved O.V.G. and defendant was a member of O.V.G.; (2) the bullets used in the shooting were 9 millimeter and the bullet on the defendant's car floor was 9 millimeter; (3) the attempt-to-locate message said that a neon purple license plate cover was on the suspect vehicle and there was a neon purple license plate cover in defendant's trunk; (4) the people shot at in the drive-by were members of West-Side Pirus; (6) at defendant's request, the police were called to Taco Maker because of a possible disturbance between O.V.G. and West Side Pirus.

Because of these circumstances, this case is unlike both *State v. Chapman*, 295 Utah Adv. Rep. 19 (Utah July 19, 1995)[5] and *Gallegos*, 712 P.2d at 210. The *Chapman* court did not even discuss the "plain view" doctrine, concentrating

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property to be seized with criminal activity.").

[4] As noted in *Brown*, probable cause determinations always have been looked at from the reasonable law enforcement officer's perspective: "[E]vidence thus collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *Id.* at 742 (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

[5] Defendant's brief gives the citation to the unamended version of this case. However, the amendment in the new opinion is not relevant to the circumstances here.

instead on the permissible scope of detention. *Chapman*, 295 Utah Adv. Rep. at 22-23.

In *Gallegos*, the state supreme court decided that evidence seized purportedly under the plain view doctrine was unlawfully taken because it was not incriminating at all. *Gallegos*, 712 P.2d at 210. There, police saw a VCR and TV while they were lawfully conducting a warrant search for drugs. Thinking that these items might be stolen, the officers began an independent investigation and seized them after concluding that Gallegos had not "rented" them. *Id.* at 208. The supreme court rejected the State's attempt to justify the seizure under the plain view doctrine. At no time, the supreme court stated, did the officers have probable cause to believe the TV and VCR were stolen; therefore, the "clearly incriminating" part of the test could not be met. *Id.* Defendant's attempt to fit this case into the *Gallegos* category by saying "[t]here is nothing inherently illegal about having a bullet in a car" is misplaced. Officer Huemiller's seizure of the bullet was not grounded on the basis that the bullet was contraband but because it was evidence of criminal activity, i.e., the drive-by shooting that had occurred just shortly before.

Had trial counsel brought a motion to suppress the bullet, it would have been without merit and rejected. The constitution does not require any counsel to

bring frivolous or meritless motions. *Codianna v. Morris*, 660 P.2d 1101, 1109 (Utah 1983). Therefore, bringing a motion to suppress was not a necessary component of constitutionally adequate representation and defendant's sixth amendment claim must fail on this ground. Because defendant's challenge does not satisfy the first prong of the *Strickland v. Washington,* 466 U.S. 684 (1984) test, it is not technically necessary to examine potential prejudice. *State v. McFadden*, 884 P.2d 1303, 1306 (Utah App. 1994) (trial counsel's failure to advise client of potential deportation was not deficient; therefore, unnecessary to examine prejudice). Nevertheless, the bullet actually appeared to be a more important part of the police investigation, i.e., building the case, than of the trial. Including Graham's written statement, four participants of the drive-by shooting testified that defendant was the shooter. This evidence alone would have justified the conviction.

II. BECAUSE DEFENDANT HAS NOT PROVIDED THIS COURT WITH A COPY OF JEREMIAH GRAHAM'S CRIMINAL RECORD OR EVIDENCE ABOUT HIS PLEA AGREEMENT, HIS ARGUMENT THAT THE TRIAL WOULD HAVE ENDED DIFFERENTLY HAD THEY BEEN INTRODUCED IS SPECULATIVE AND DOES NOT ESTABLISH INEFFECTIVENESS.

Defendant claims his trial counsel should have introduced evidence of Jeremiah Graham's criminal record and his plea bargain. Graham, a participant in the drive-by shooting, sat in the back of the truck with defendant. Shortly after the incident, he temporarily repented of his crime, confessed his involvement and named defendant as the gunman in a written statement (R. 233-36). At trial, however, Graham denied everything: the drive-by shooting, the statement, his signature on the statement, any agreement to testify in exchange for his statement, and defendant's membership in O.V.G. (R. 224-25).

Because of this denial, the State's direct examination was short and limited in focus. Consequently, trial counsel's cross-examination was also short and even more limited. On appeal, defendant asserts that trial counsel failed to "properly request Mr. Graham's criminal record" and "interview Mr. Graham to determine that he had received a plea bargain in exchange for testimony against [defendant]." Brief of Defendant at 15-16. However, defendant never documents these assertions, nor does he provide the Court with copies either of the plea agreement or the criminal record. Therefore, defendant's appellate challenges are nothing more than speculation and cannot lay a foundation for an ineffectiveness challenge. *Fernandez v. Cook*, 870 P.2d 870, 877 (Utah 1993) ("On many occasions, this court has reiterated that proof of ineffective assistance

of counsel cannot be a speculative matter but must be a demonstrable reality."). For this reason, *State v. Templin*, 805 P.2d 182, 185 (Utah 1990) does not support defendant's position. Templin brought out evidence of his trial counsel's negligence in a hearing on a motion for new trial. *Id.* Defendant never requested such a hearing nor has he asked for one under rule 23B, Utah Rules of Appellate Procedure. Because of this failure, he cannot establish what investigation trial counsel actually carried out or what the results of a hypothetical investigation would have been.

In any event, Graham's statement was cumulative. Impeaching evidence discrediting it would not have substantially detracted from the total evidence against defendant. Graham was only one of four co-gang members who testified against defendant. Their statements on the stand were substantially the same; indeed, Jesse Diarte's, Orlando Naranjo's and Emmett Johnson's testimony were more damning (R. 463; R. 337-38; R. 297-302). Due to the overwhelming nature of this testimony, the value of defendant's hypothesized impeachment would most likely have a negligible effect on the jury's deliberation. Thus, the decision not to attempt impeachment may have been a legitimate, strategic one on the counsel's part.

When a trial counsel is in the midst of trial, he or she prioritize goals and objectives. The very words "strategy" and "tactics," used consistently to describe counsel's discretionary decisions in ineffectiveness cases, call to mind a military analogy which may be helpful to further develop. In a military battle, a soldier may find he is being shot at from several different directions simultaneously. Obligated to quickly evaluate options, he chooses to concentrate his response on what he believes is the most dangerous combatant. Similarly, trial counsel here may simply have chosen to devote his time and resources on attacking what he believed to be the prosecution's most powerful witnesses. In this light, it is interesting to note defendant's apparent concession that trial counsel's impeachment and cross-examination of Naranjo and Diarte was proper. Brief of Defendant at 14-15. This supports the already present presumption that trial counsel's actions were part of a legitimate design. *State v. Dunn*, 850 P.2d 1201, 1225 (Utah 1983) ("[I]f the challenged act or omission might be considered sound trial strategy, we will not find that it demonstrates inadequacy of counsel."); *State v. Tennyson*, 850 P.2d 461, 465-66 (Utah App. 1993) ("[T]his court will not second-guess trial counsel's legitimate strategic choices, however flawed those choices might appear in retrospect.").

The relatively scant value of impeaching Graham's written statement also affects the prejudice analysis. Because of the number of the eyewitnesses and the strength of their combined testimonies, adding the hypothetical impeachment most likely would **not** change the result of the jury's deliberations. Thus, on appeal, defendant's challenge to his trial counsel's decision not to attack Graham's credibility survives neither prong of the *Strickland* test.

CONCLUSION

Defendant's convictions should be affirmed.

RESPECTFULLY SUBMITTED THIS 12th day of September 1996

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CERTIFICATE OF MAILING

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